

FEB 23 1981

MEMORANDUM

**SUBJECT:** Issuance of Section 113(a) Orders to NSPS Sources for Failure to Conduct Performance Tests

**FROM:** Director  
Division of Stationary Source Enforcement

**TO:** Louise D. Jacobs  
Director, Enforcement Division  
Region VII

This office has received copies of the administrative orders issued by your office pursuant to Section 113(a) of the Clean Air Act (the Act) to the A. G. Sherwood Construction Co. of Independence, Kansas (Dec. 22, 1980), and the Beachner Construction Co., Inc. of St. Paul, Kansas (Nov. 26, 1980). Those orders required the companies to conduct performance tests within 30 days of the effective dates of the orders and to demonstrate compliance with the applicable New Source Performance Standard (NSPS), or to cease operation.

While the use of Section 113(a) orders to require performance tests is an effective enforcement tool, we believe that requiring shutdown as a sanction for failure to conduct the test should be judiciously applied. We believe that shutdowns should be required only in compelling circumstances because the burden of shutdown falls, in part, on the employees of the company, who are not culpable in causing the violation. We recommend that the Regional Office take a hard look at the facts and equities in each case before ordering shutdown.

In determining whether requiring shutdown is appropriate the Regional Office should be sensitive to potentially mitigating circumstances. In addition to recognizing that the burden of shutdown falls in part on innocent employees, the Regional Office should consider the environmental impact of emissions from the source, both in terms of their nature and amount. In connection with this consideration, it may be appropriate to make a preliminary determination of the probable compliance status of the source with the applicable emission limitation. For example, it would be appropriate to compare the control equipment to be utilized (albeit, not tested) by the subject source with control equipment and strategies at similar sources which have (or, perhaps, have not) demonstrated compliance with the emission limitation.

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- We believe that it is also important to analyze the reasons for the source owner's failure to perform the required test. Although the NSPS regulations do not provide for an extension of the 180 day from startup limit for performance testing, some flexibility may be appropriate in certain circumstances, e.g., force majeure situations. Indeed, the Regional Office in the past has recognized the need to provide additional time in which to conduct the performance test. Thus, in Prairie States Construction Co. and Shilling and Aubel, Inc., the Region agreed to consent decrees rather than issue shutdown orders.

In sum, because shutdown is the strongest civil sanction available under the Act, EPA must be able to defend its use by reference to the factual and equitable circumstances in each case. Engaging in this analysis enables the Agency to defend more effectively its actions when charged with discriminatory applications of policy.

If you have any questions with respect to this issue, please do not hesitate to contact me at (FTS) 755-2550, or Edmund Gorman of my staff at (FTS) 755-2570.

Edward E. Reich

bcc: Ed Gorman  
Myra Cypser